

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

MISCELLANEOUS CRIMINAL APPLICATION 30 OF 2004

MARK BARASA KAKAI.....APPLICANT

VERSUS

- 1. C.P.L. FRED NYONGESA**
- 2. A.P.C. BENSON KIPTANUI**
- 3. REPUBLIC.....RESPONDENTS**

RULING

The complain before this court is contained in a summons dated 2nd October 2004 in which the applicant, Mark Barasa Kakai prayed to this court to set aside the order issued on 9/8/2004 by the senior Resident Magistrate sitting at Webuye in Webuye S.R.M.C.Cr. case no. 174 of 2004 **REPUBLIC VS MARK BARASA KAKAI**. The applicant says he has had an out of court settlement with the complainant in the case before the trial court but the learned senior Resident Magistrate did not give them a chance. He also complained that the notice to sale the security was issued without giving the registered proprietor a hearing.

Mr. Onderi, the Senior state counsel did not oppose the application. He was of the view that the complain should be addressed because many complaints have reached his office against that particular court in discriminatively ordering for forfeiture of security documents pledged by sureties.

The facts leading to this application are as follows. On the 17th day of March 2004, the applicant was charged with the offence of assaulting a police officer contrary to section 253 (b) of the penal code. He denied the same and he was released on a bond of Ksh.50,000 with one surety of like sum. On 31st March 2004, one Fred Wafula Pengi stood surety for the applicant by pledging his title L.R. No. EAST BUKUSU/SOUTH NALONDO/1162 as security.

The record shows that the accused, now the applicant absconded from attending court on 8th July 2004 which prompted the learned senior Resident Magistrate to issue a warrant of arrest and to further summon the surety to appear. The record shows that the surety did not attend court and the trial magistrate directed the executive officer of her court to write to the surety to notify him of the court's intention to sell the property. Again the surety did not appear and the learned magistrate directed the executive officer to instruct an auctioneer to sell the property to realize the security by public auction. It would appear this information reached the applicant. So far the surety has never appeared.

I exercised my revisional powers under S. 362 of the criminal procedure code to call for the proceedings for examination. The record does not indicate how the summons and letters were served upon surety. There is doubt whether the surety was contacted. I am of the view that the orders made on 9th August 2004 were issued without hearing the surety. It is the duty of a court of law to make sure that parties who are likely to be affected by orders of forfeiture must be given a chance to give their story. The trial court therefore breached the basic tenets of the rules of natural

justice.

The procedures concerning forfeiture are clearly set out under section 131 of the criminal procedure code. The trial court did not follow the mandatory provisions of the law before issuing order to sell L.R. No. EAST BUKUSU/SOUTH NALONDO/1162. Where a court fails to follow mandatory provisions of the law, this court will exercise its power on revision to interfere with such an order.

In view of the above I set aside the orders of forfeiture given on 9th August 2004. I also direct the Deputy Registrar to remit back Webuye S.R.M. Criminal case No.174 of 2004 to Webuye S.R.M'S court.

DATED AND DELIVERED THIS 18th DAY OF February 2005

J.K. SERGON

JUDGE